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NO. 85-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 22 of the Rules of this Court, petitioners reply herein to arguments raised in the Brief

in Opposition to the Petition to Certiorari submitted on behalf of respondent Otis Elevator Company.

Otis argues that this Court's decision in Oscar Meyer and Company v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979) somehow supports its position by the holding that although recourse to state remedies is required before a federal action under the ADEA can be brought, the state complaint need not be timely filed. Actually, it cuts the other way. If an untimely proceeding initiated under state law, which clearly will be dismissed at that level, satisfies the requirements of the ADEA and the action can then proceed, why is the purpose of aiding enforcement of the federal law through state means not better served by the filing of a

timely lawsuit which may actually result in disposition of the case thereby shielding EEOC and the federal courts from any extra burden?

In Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 1890 (1983) the Court did hold that ERISA does not preempt state anti-discrimination laws to the extent that those laws were part of the federal statute's scheme of enforcement. 463 U.S. at 101, 103 S.Ct. at 2902. Otis would have that read very narrowly in a manner clearly at odds with the intent of Shaw. Thus, the ADEA requires only a brief deferral to a state agency and then a federal action may proceed. Yet does this mean that where an administrative proceeding is instituted in the state agency and the 60 day deferral period has ended, any further

proceedings by that state agency are preempted? Surely that was not this Court's meaning?

What this Court did say in Shaw was that limiting remedies for discrimination to federal remedies is what would impair the federal statute. 463 U.S. at 102, 103 S.Ct. at 2902-2903. The only basis on which ERISA would preempt a state anti-discrimination law would be where that law was broader than a federal statute. Only when something allowed under Title VII was barred by the state statute would the interdependency of the laws be lacking. 463 U.S. at 103, 103 S.Ct. at 2903. In fact, when discussing the "minor practical difficulties" which would be imposed on administration of state law by the need to determine whether

substantive provisions are consistent with federal law, the Court in Shaw said:

> It seems more than likely, however, that state agencies and courts are sufficiently familiar with Title VII to apply it in their adjudicative processes.
>
> 466 U.S. at 106, 103 S.Ct. at 2904 (emphasis added)

The above language would certainly seem to indicate that it was contemplated that both administrative and court proceedings in the states under their respective laws could go forward as long as care was taken to make sure that practices legitimized by Title VII were not being prohibited under state law.

That Otis is further wrong when it argues that the uniformity that this court sought to preserve in Shaw is

affected by statute of limitations considerations is demonstrated by the fact that the discussion of the need for uniformity in Shaw was limited to the need to avoid substantive differences in state laws, depriving an employer of the ability to provide the same benefits in each state. See 463 U.S. at 105, 103 S.Ct. at 2904. A different statute of limitations has no effect on what benefits an employer may provide. By knowing what is allowed under Title VII or the ADEA, an employer knows what is allowed in any state for employee benefits. While Otis claims that more than substantive uniformity was contemplated in Shaw, it cites nothing in support of that proposition and admits that the facts in Shaw were limited to substantive rules of state

law. Brief in Opposition at page 12, n.11.

A number of cases cited by Otis do not support the propositions for which they are cited and shall be addressed briefly. For example, Allis-Chalmers Corp. v. Lueck, 471 U.S. ___, 105 S.Ct. 1904 (1985) concerned preemption of a state cause of action for bad faith handling of an insurance claim. This Court held that the state law claim was preempted because of the general preemption of any labor contract matters by Section 301 of the Labor Management Relations Act. The case turned on principles peculiar to the area of labor law and has no applicability here.

Nor is Utley v. Varian Associates, 625 F.Supp. 104 (N.D. Cal.

1985) any more relevant. In Utley, the alleged misconduct was violation of a federal Executive Order regarding inclusion of non-discrimination and affirmative action programs in all federal government contracts. The plaintiff attempted to allege a violation of the California Fair Employment and Housing Act by virtue of violations of requirements imposed by the Executive Order. The court held that because it had previously been established that violations of the Executive Order could not be the basis of a private cause of action for damages, the plaintiff in Utley could not attempt to create such a private cause of action by claiming that it arose under the California statute. It has nothing to do with the issue posed

here, where a direct violation of a state statute is alleged. In Utley, the state statute was simply being used as a mechanism to attempt to assert what was clearly a federal claim for violation of the president's Executive Order.

Otis attempts to bootstrap its argument regarding the statute of limitations by reference to Maynard v. Revere Copper Products Inc., 773 F.2d 733 (6th Cir. 1985). (Brief in Opposition at page 12, n.10). There, as in Allis-Chalmers, the case turned on the fact that the cause of action asserted, for unfair representation by a labor union, was totally preemted by the Labor Management Relations Act. The fact that the federal statute of limitations had run required dismissal of the state claim because in any action

in state court only federal law could be applied due to the overriding preemption. Here the question is whether the differing statute of limitations itself requires a finding of preemption as held by the New Jersey Supreme Court, or whether only considerations of substantive uniformity between federal and state anti-discrimination statutes should be applied as urged by petitioners.

Turning to the question of whether substantively the so-called plan adopted by Otis, the HSSRP, is lawful under the ADEA, petitioners briefly want to address the two cases relied upon by Otis.

In Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), under the Federal Employees Early Retirement Act,

employees subjected to a reduction in force could take early retirement either if they were 50 years old or more with 20 years or more of service or, if under age 50, had 25 years or more of service. The plaintiff was under 50 years old and had 20 years of service, and claimed his ineligibility for early retirement violated the ADEA. The court held the statute could not be a subterfuge because retirement was optional and the statute predated the ADEA. 562 F.2d at 346.

One obvious distinction between Mason and this case is readily apparent. Even those employees under age 50 could qualify for the plan, needing more years of service. Here, anybody under age 55 was ineligible no matter how many years of service they

had. Most significant is the legislative history quoted by the court in Mason:

> Under present law, an employee who is at least age 50 and had at least 20 years' service or 25 years' service regardless of age, may retire on an immediate annuity if he is involuntarily separated, as when he is reached by reduction in force. Unless the employee is old enough and has sufficient service to retire optionally (age 55 with 30 years of service, age 60 with 20, or age 62 with 5), if he is not reached for reduction in force, he does not have the right to retire even if he is desirous of doing so, and thus [the law permits] an employee who wants to continue to work to be retained. The proposed legislation would simply give the long service employee who is not eligible to retire under the regular optional retirement provision of the law the opportunity to retire voluntarily during a limited period when his agency is

undergoing a major reduction in force.

S. Rep. #152, 93rd Cong. 1st. Sess. 5 (1973) quoted in Mason, 562 F.2d at 347 (emphasis added)

The emphasized material in the above quotation indicates congressional approval of making early retirement available to those who would not otherwise qualify when a reduction in force occurs. At Otis, all of those who participated in the HSSRP were already eligible for early retirement under the regular retirment plan, and did not need creation of any new plan in order to elect to retire rather than be terminated. Thus, the Mason decision does not apply to the facts of this case.

While Otis, as it has throughout this case, attempts to brush

aside the decisions in EEOC v. Borden's Inc. 724 F.2d 1390 (9th Cir. 1984) and EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. den. ____ U.S. ___, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984), that attempt is completely lacking in substance. The question is not whether the HSSRP could qualify as a plan under ERISA, but rather if it is a plan within the exemption provision of the ADEA for bona fide pension plans. The decisions in Borden's and Westinghouse make it clear that it is not. Furthermore Otis continues to seek to have this Court ignore the most salient fact about the HSSRP, namely that at the time it was actually given, the decision to close the plant entirely had been made and no one had a choice of voluntary early retirement as opposed to

lay-off. Those who went into the HSSRP were simply taking the greater benefits available as would anyone in those circumstances. Were the plant not being closed, this might be a different case, but what might have been is not germaine.

By the same token Otis can claim no solace from Patterson v. Independent School District No. 709, 742 F.2d 465 (8th Cir. 1984). In Patterson the plan at issue was designed to supplement the general pension plan already in effect. Under the regular plan an older teacher would have a higher retirement pay because years of service were taken into account. The supplemental plan offered an extra bonus payment for taking retirement at an earlier age. The plaintiff complained

that he was discriminated against because he could not take advantage of this early retirement benefit. However, the only reason he could not was that the plan was only created to become effective in 1980 and he retired in 1981 by which time he was already too old for any retirement to be considered "early." Thus, the only grounds advanced for claiming that the plan was discriminatory was that it had not been created sooner. Moreover, Patterson did not involve closing down the school district where everybody was going to lose their job and the only question was differing benefits. Therefore it has no precedential value for the facts presented here.

What the participants in the HSSRP received was in reality nothing

more than a form of severance pay given that they were losing their jobs no matter what they did. Given that fact, the Borden's and Westinghouse cases are much more on point than either Mason or Patterson. Furthermore, Otis has failed to address the EEOC regulations which provide that additional severance pay to older employees may be lawful. As the Appellate Division of the New Jersey Superior Court correctly found in this case, a fact issue was presented on that score which can only be decided after a full record is created.

CONCLUSION

For the aforestated reasons, the petition for a Writ of Certiorari should be granted.

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